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FACULTY PERSPECTIVES

{Recent Scholarship Highlights}

FALL 2013



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FACULTY PERSPECTIVES

FALL 2013

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{Constitutional Jurisprudence}

WHY BROCCOLI?

LIMITING PRINCIPLES AND
POPULAR CONSTITUTIONALISM
IN THE HEALTH CARE CASE

forthcoming in UCLA LAW REVIEW, volume 61

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Christopher Schmidt joined the IIT Chicago-Kent faculty in 2008. He is also a faculty fellow at the American Bar Foundation and the editor of *Law & Social Inquiry*. He has received fellowships from the American Society for Legal History and the Miller Center of Public Affairs at the University of Virginia and was selected to present at the 2012 Junior Faculty Forum at Harvard Law School. He teaches in the areas of constitutional law, legal history, comparative constitutional law, and sports law. He is currently working on two book projects, one on the history and legacy of *Brown v. Board of Education*, the other on the student sit-in movement of 1960. For more, visit his faculty webpage at www.kentlaw.iit.edu/faculty/cschmidt.

Why Broccoli?

Limiting Principles and Popular Constitutionalism in the Health Care Case

BY MARK ROSEN & CHRISTOPHER SCHMIDT

BROCCOLI MADE ITS appearance early in the debate over the Patient Protection and Affordable Care Act (ACA). At first it seemed a joke, one of those spasms of political hyperbole that seem to emerge in any heated public debate. At issue was the constitutional authority by which the U.S. Congress could require people to purchase health insurance—the individual mandate provision of the ACA. If the Constitution were read to allow the federal government to require individuals to purchase health insurance, critics asked, was there anything to prevent the government from requiring people to do all sorts of things against their will? Could the government demand that people purchase broccoli?

No one in Congress had ever seriously considered such a broccoli mandate, of course. The issue at hand was health care and insurance, not green vegetables. Broccoli was a pure hypothetical of the slippery-slope, *reductio ad absurdum* variety. Yet the broccoli hypothetical proved to be a surprisingly persistent presence in

the constitutional challenge to health care. Conservative lawyers pressed the broccoli analogy (along with other hypothetical mandates) in their numerous legal challenges to the ACA, and broccoli found its way into the text of several lower court opinions. When the U.S. Supreme Court Justices pressed the broccoli hypothetical on Solicitor General Verrilli during oral arguments, the only surprise was that he did not have a crisp response to the question everyone fully expected would be asked.

The Supreme Court's ruling in *National Federation of Independent Business v. Sebelius* (NFIB) sealed broccoli's immortality in constitutional jurisprudence. The three main written opinions included twelve references to broccoli and five separate discussions of the broccoli mandate's legal implications. Five Justices cited the government's inability to provide a satisfying answer to the broccoli hypothetical as a justification for creating a novel limitation on Congress's Commerce Clause powers and for concluding that the ACA's

**Excerpted from Mark Rosen and Christopher Schmidt, Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Decision, forthcoming in volume 61 of the UCLA Law Review (2013).*

mandate exceeded that limit. Even the dissenters to the Commerce Clause holding felt compelled to respond to what Justice Ginsburg referred to as “the broccoli horrible.”

The Justices’ consensus concerning broccoli’s significance in their constitutional analysis of the ACA conceals an as-of-yet unrecognized puzzle: All the Justices took for granted that the Court had to provide a response to the broccoli hypothetical. To appreciate the puzzle, three points must be recognized. First, the broccoli hypothetical was, at base, a provocative way to demand a limiting principle; any answer as to why Congress had power to enact the ACA’s mandate, but not the hypothetical broccoli mandate, would require the identification of such a principle. Second, the ACA’s mandate raised a novel constitutional question; Congress had never before used its Commerce Clause powers to require virtually everybody to purchase something. Third, a survey of constitutional history shows that when confronted with novel constitutional questions, the Court almost always declines to provide limiting principles that define the metes and bounds of the constitutional power or right at issue.

“We argue that popular mobilization against the ACA . . . served to link the extrajudicial constitutional movement mobilized against the law and the constitutional challenge taking place in the courts.”

Instead, the Court typically answers the question in a narrow, localist fashion that analyzes and answers the constitutionality of only the governmental action that is be-

fore the Court. Indeed, the Court typically avoids any attempt at identifying a limiting principle until it has considered the constitutional question many times, and not infrequently it declines to *ever* identify a limiting principle.

So here is the puzzle: Why did the *NFIB* Court assume that it could uphold the individual mandate on Commerce Clause grounds only if a limiting principle could be found? Indeed, why did not even a single Justice suggest that the broccoli hypothetical need not be answered—that is to say, that a limiting principle need not have been provided—to decide *this* case?

The answer to this puzzle lies outside the Court. It requires attention to dynamics of constitutional development that scholars have examined under the label “popular constitutionalism.” What made this case unique was the exceptional level of demand from outside the courts that the limiting-principles question play a central role in resolving the constitutional challenge. By the time the case reached the Supreme Court, a robust public engagement with the constitutional issues had already developed. This engagement was the product of the Tea Party movement, which was committed to a belief that the ACA violated core constitutional principles. The Republican presidential primary fueled these Tea Party sentiments with the contenders’ universal condemnation of the ACA. Lower court rulings that struck down the individual mandate animated these sentiments even further. At the center of this roiling public debate were the broccoli hypothetical and the difficult questions it raised about limiting principles. These popular constitutional demands, which revolved around the singularly evocative broccoli hypothetical, structured public expectations about the stakes of the ACA challenge to such a degree that it would have been notable had

the Court chosen not to go beyond the facts of the case to engage with the limits of congressional power.

The story of broccoli, limiting principles, and the ACA challenge raises difficult questions about the relationship between popular constitutional demands and the courts. What are the costs and benefits of allowing extrajudicial pressures to influence the Supreme Court's evaluation of constitutional issues? In this Article, we argue that popular mobilization against the ACA—including the demand for a response to the broccoli hypothetical—served to link the extrajudicial constitutional movement mobilized against the law and the constitutional challenge taking place in the courts. While much of the critique of the mandate outside the courts focused on ways in which it violated basic principles of liberty and free choice, a straight rights-based claim, such as one based on the Due Process Clause, never had a chance inside the courts. The legal issue before the courts was, strictly speaking, a question of congressional power and federalism, not individual liberty. Thus there was something of a disconnect between the technical ways in which courts engaged with the constitutional challenge—as a question of structural limits and enumerated powers—and the ways in which most Americans thought about the constitutional issues—as a question of individual liberty versus government regulation. The ACA litigation offers a striking example of how doctrinal analysis can fail to map onto public sentiment about the constitutional stakes.

How the courts approach a particular constitutional issue often differs from how the public views the same issue of course. Yet in the ACA case, this dynamic was particularly notable because the difference was so significant and the public

interest in the constitutional dispute was so intense. The hypothetical broccoli mandate shrunk this disconnect in a way that advantaged the law's challengers. In effect, broccoli served a two-way signaling function between judicial actors (lawyers and judges) and nonjudicial actors (political actors and the larger public). Its resonance in the political arena signaled to those litigating the case the importance of liberty concerns in the larger extrajudicial constitutional battle over the ACA. And it provided judicial actors a symbol with which to demonstrate their sympathy with this liberty-based critique of the health insurance mandate. The fact that the Court identified a concern with protecting individual liberty as a core principle of its commerce power analysis, and did so at least partly in response to extrajudicial demands from critics of the law, is a classic example of the generative, responsive potential of popular constitutionalism.

But another, more problematic, dynamic of popular constitutionalism is at play in the ACA case. In *NFIB*, popular constitutional demands not only pressured the Court to more squarely confront the potential liberty costs of the individual mandate but—by insisting that the limiting principle issue be resolved—also may have pressured the Court into abandoning the established practice by which it develops constitutional doctrine. In this way, the evocative broccoli hypothetical and related popular constitutional arguments not only affected the substance of the constitutional principles the Court considered in *NFIB* but also the *process* by which it worked through the doctrinal standard that emerged from the ruling.

If one values the benefits of the common law, inductive approach to shaping constitutional principles in the courts, this little appreciated dynamic of popular constitutionalism may be cause for concern.

The tools of constitutional decisionmaking in the judicial realm are—and we suggest should be—distinct from the tools of constitutional claim making that tend to resonate outside the courts. The Court's premature engagement with limiting principles bypassed the benefits of its ordinary incremental, case-by-case analysis and circumvented institutional synergies that can generate superior and more democratically legitimate outcomes when courts and legislatures work together to flesh out constitutional judgments over time. ■

MARK ROSEN SELECTED PUBLICATIONS

Articles

Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres, __ *University of Illinois Law Review* __ (forthcoming).

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Book Contributions

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CHRISTOPHER SCHMIDT SELECTED PUBLICATIONS

Articles

The Challenge of Supreme Court Biography: The Case of Chief Justice Rehnquist, *Constitutional Commentary* (forthcoming).

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Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech, 88 *Chicago-Kent Law Review* 487 (2013) (symposium editor).

Conceptions of Law in the Civil Rights Movement, 1 *UC Irvine Law Review* 641 (2011).

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Book Contributions

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{Property Rights}

DIGNITY TAKINGS

ADDRESSING THE LEGACY OF LAND
DISPOSSESSION IN SOUTH AFRICA

forthcoming from OXFORD UNIVERSITY PRESS

Bernadette Atuahene

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Bernadette Atuahene has varied experiences in the field of law and international development. During law school, she worked as a legal consultant for the World Bank and as a human rights investigator for the Center for Economic and Social Rights, where she received Amnesty International's Patrick Stewart Human Rights Award for her work with human rights organizations throughout South America.

After law school, Professor Atuahene was in South Africa as a Fulbright Scholar. She served as a judicial clerk at the Constitutional Court of South Africa, working for Justices Madala and Ngcobo. She then practiced as an associate at Cleary, Gottlieb, Steen & Hamilton in New York, where she focused on sovereign debt and real estate transactions.

Professor Atuahene joined the IIT Chicago-Kent faculty in 2005. She teaches Law, Policy and International Development; Property; and International Business Transactions. In 2007 she was selected to become a Faculty Fellow at the American Bar Foundation. She also won the Law and Public Affairs Fellowship and was a visiting assistant professor at Princeton University for the 2011–12 academic year.

Broadly, Professor Atuahene's research deals with the confiscation and restitution of property. In 2008 she won the Council on Foreign Relations International Affairs Fellowship and worked with the South African Director General of Land Affairs and his staff. The following summary is from her forthcoming book about the Land Restitution Program, which is based on 150 interviews she conducted of program beneficiaries. She is also directing and producing a documentary film about one family's struggle to reclaim their land.

For more, visit her faculty webpage at www.kentlaw.iit.edu/faculty/batuahene.

Dignity Takings:

Addressing the Legacy of Land Dispossession in South Africa

BY BERNADETTE ATUAHENE

ADANNA CAME INTO this world swaddled in apartheid's indignities. Adanna's father was a white farm owner and her birth mother was one of his African farm hands. When Adanna's birth mother died, her father abruptly dropped her off in Kliptown—a town about 35 kilometers from Johannesburg—to live with an African woman named Ma Zwane and her son. That is the last time either Adanna or Ma Zwane laid eyes on the man. Ma Zwane eventually adopted Adanna and she became a full-fledged member of the Zwane family.

Ma Zwane was a nurse. When looking at one of her pictures you see a middle-aged woman, lips full with pride, smooth dark skin impervious to the wrinkles time etches. Although the South African apartheid state made it especially difficult for Africans to own property in the cities, Ma Zwane was unbowed. She saved her modest earnings and eventually purchased two properties in Kliptown. Her properties brought in a steady stream of rental income and also earned her respect

and social standing among her neighbors in Kliptown—a tight knit, cosmopolitan community where Africans, Indians, Chinese, whites, and coloureds lived side by side.

Ma Zwane dreamed that Adanna would one day secure an education that could shield her from the physical and mental violence that apartheid heaped on people kissed by the sun. So, when Adanna finished standard eight (grade 10), Ma Zwane enrolled her in a commercial course where she learned shorthand and typewriting. Unfortunately, despite her education and specialized training, Adanna's brown skin prevented her from advancing. "I could not get a job because at the time they were not hiring non-whites in the offices to do all that, and as a result there was nothing else I could do but go to the factory." As the dreams Ma Zwane wove for Adanna began to unstitch, she prayed that the properties could provide Adanna with the extra layer of protection that she so desperately needed as a black woman living under South Africa's apartheid re-

**A summary of Bernadette Atuahene's forthcoming book, DIGNITY TAKINGS: ADDRESSING THE LEGACY OF LAND DISPOSSESSION IN SOUTH AFRICA, to be published by Oxford University Press in 2014.*

gime. But, after Ma Zwane died in 1955, Adanna's life began to unravel.

To execute its white supremacist agenda of subordination and separation, in 1963, the South African apartheid government proclaimed that only Europeans could inhabit Kliptown. Soon after, the government uprooted Adanna and her neighbors and relocated them to townships designated for their specific racial and ethnic groups. After forcing Adanna and her brother to move to Soweto (the township designated for Africans), the government demolished the two properties that they inherited from Ma Zwane and gave them only nominal compensation. With a heavy heart Adanna observed, "when you own something, you feel proud that you have got something. But, when they take that away from you, feel naked. . . . You feel as if you are stripped naked. You are nothing."¹ The bulldozers that razed Kliptown did not just demolish physical buildings, they destroyed Adanna's vibrant community, stole her inheritance, and denied her dignity. Most importantly, the destruction and relocation were part of the apartheid regime's strategy to subjugate blacks and cement their position as sub-persons in the polity.

South Africa is not the only nation where one group of people has subjugated another and stripped them of their property and dignity. Other examples include the Nazi confiscation of property from Jews during World War II; the US expropriation of Japanese property during their internment; the Hutu taking of property from Tutsis during and after the genocide; the US, Canadian, and Australian commandeering of native peoples' property; the European usurpation of property from native peoples during colonialism and apartheid; Idi Amin's banishment of

people of Indian descent from Uganda and the confiscation of their property; and Saddam Hussein's seizing of property from the Kurds in Iraq.

The list is long, but when the wars stopped, apartheid and colonialism fell, the dictatorships ended, and the genocides halted, the governments that emerged from the ashes had to navigate the perilous landscape surrounding the return of land and other property to displaced or decimated populations. These nations had a choice: they could ignore the fact that people were deprived of their property, or they could address it. Many states addressed past property dispossession by providing a remedy. A comprehensive remedy, however, addresses the full spectrum of damage done by the dispossession.

In certain instances, the damage is extensive because the dispossession is part of a larger strategy to further subjugate a certain group within the polity by denying their humanity or their capacity to reason. This type of dispossession is what I call dignity takings, which is when a state directly or indirectly destroys or confiscates property rights from owners or occupiers who it deems to be sub-persons without paying just compensation or without a legitimate public purpose. Dignity restoration is a comprehensive remedy that compensates people for the physical assets confiscated while also addressing the dignity deprivations involved.

International law and most programs aimed at remedying past property seizures have focused on reparations rather than dignity restoration. (See Atuahene, "From Reparation to Restoration..." 60 *SMU Law Review* 1419 (2007); Scott Leckie, "Housing and Property Issues for Refugees and Internally Displaced Persons..." 19 *Refugee Survey Quarterly* 5 (2000).) Reparations is "the right to have restored

¹ Confidential interview, Gauteng, South Africa (2008).

to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them.” (United Nations, *Report of the Committee on the Elimination of Racial Discrimination* (1996).) While reparations involve reimbursement for the property taken, dignity restoration is based on principles of restorative justice and thus seeks to rehabilitate the dispossessed and reintegrate them into the fabric of society. As John Braithwaite states, restorative justice is interested in “restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberate democracy, restoring harmony based on a feeling that justice has been done, and restoring social support.” (“Restorative Justice...,” 25 *Crime and Justice* 1 (1999).) When reparations and restorative justice are married, dignity restoration is the offspring of this formidable union.

Most states that have addressed past property violations have not undertaken dignity restoration because it is a more time-consuming, complicated and expensive remedy than reparations. South Africa’s colonial and apartheid era land dispossessions are a quintessential example of dignity takings, and the post-apartheid government is unique because it has tried to move beyond reparations to facilitate dignity restoration. It understood its land restitution program as an opportunity to restore wealth as well as dignity

to its black citizens. (See South Africa’s *Department of Land Affairs Annual Report, 2001–2002* (2002).) Using the South African land restitution process as a case, the central question that the book considers is: when there has been a dignity taking, what does dignity restoration require?

The primary data source was 141 in-depth, semi-structured interviews of people from Johannesburg, Cape Town and surrounding areas who participated in the South African land restitution program. In addition, the book relies on secondary sources such as government documents, books, newspapers and academic articles;

26 semi-structured interviews of officials working for the South African land claims commission; and participant observation I conducted while occupying an office in the Central Land Claims Commission in Pretoria in 2008.

“This type of dispossession is what I call dignity takings, which is when a state directly or indirectly destroys or confiscates property rights from owners or occupiers whom it deems to be subpersons without paying just compensation or without a legitimate public purpose.”

Part I of the book introduces and defines the book’s first central concept—dignity takings. Using insights from social contract theory, the first chapter develops the theoretical framework for dignity takings. To demonstrate empirically how dignity takings unfolded in South Africa, the second chapter uses respondents’ accounts of their lives before the forced removals and how the apartheid state displaced them from their homes and property. The central finding is that dignity takings in South Africa involved deprivations of wealth, agency and community.

Part II of the book introduces and defines the book’s second central con-

cept, dignity restoration, and investigates whether or not the South African land restitution process facilitated it. In the third chapter, interviews of commission employees provide their perspective of how the restitution program was supposed to operate in theory and how it actually worked in practice. This perspective is counterpoised with a description of how the process worked based on interviews of respondents, who each went through the land restitution process. Two stories emerge from this double-sided analysis. One story is about how the ever-looming deadline to finalize all the claims impaired the commission's ability to effectively address the deprivations of wealth, agency and community. The other story is about how dispossessed people were often overwhelmed and unable to smoothly navigate their way through the complicated restitution process because they did not have the financial resources, knowledge, networks, or assistance from civil society organizations necessary to hold the commission accountable when it was not acting in their interest or strictly in accordance with the relevant laws.

The fourth chapter explains why a sustained conversation between commission officials and respondents increased the state's capacity to address deprivations of wealth, agency and community and thereby facilitate dignity restoration. Unfortunately, the communication strategy adopted by the commission was susceptible to communication breakdowns that obstructed these important conversations. Since there were about 80,000 claims filed, respondents who had the power to demand the attention of commission officials had their voices heard while those who could not were silenced.

The fifth chapter explores the ways in which the restitution awards affected respondents' wealth and dignity. It de-

scribes the circumstances under which the restitution awards increased respondents' net worth. The chapter then explores how respondents created meaning by using the awards in ways that they felt honored those who suffered dignity takings, but died before they received justice.

The book concludes by moving the discussion from the South African case back to the global stage. While history is replete with instances where communities and individuals were subject to dignity takings as a result of war, political turmoil, dictatorships, or colonial regimes, when dignity takings occur in the future, international organizations, bureaucrats, policy makers, NGOs and intellectuals can use the South African experience to shed light on how to facilitate dignity restoration. ■

SELECTED PUBLICATIONS

Books

Dignity Takings: Addressing the Legacy of Land Dispossession in South Africa (Oxford University Press, forthcoming 2014).

Articles

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{History of Civil Rights and Liberties}

SECTION 1983 IS BORN

THE INTERLOCKING SUPREME COURT STORIES OF TENNEY AND MONROE

forthcoming in LEWIS & CLARK LAW REVIEW, volume 17

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Sheldon Nahmod is a well-known expert on constitutional law, civil rights and the Law of Section 1983. He is the author of *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* (4th ed. 2011; 3 vols.); *A Section 1983 Civil Rights Anthology* (1993); a casebook, *Constitutional Torts* (3d ed. 2010, with Wells and Eaton); and numerous law review articles. He has argued civil rights cases in the U.S. Supreme Court and many other federal courts. In addition, he lectures regularly on civil rights matters to federal judges and attorneys throughout the country. He also lectures to lay groups on constitutional law.

Professor Nahmod practiced with a corporate law firm and was a legal services staff attorney before entering academia. He also was a teaching fellow at Harvard Law School. After joining IIT Chicago-Kent, he served as associate dean for three years, and was named IIT Distinguished Professor in 1992.

Professor Nahmod has served as chair of the Section on Civil Rights, the Section on Law and Education, and the Section on Law and Religion of the Association of American Law Schools. In 2001, he received the Jefferson Fordham Lifetime Achievement Award for his work in Section 1983 jurisprudence from the American Bar Association's section on State and Local Government Law. He founded and for many years co-directed the Institute for Law and the Humanities.

Professor Nahmod blogs on Section 1983, constitutional law and other law-related topics at nahmodlaw.com.

For more, visit his faculty webpage at www.kentlaw.iit.edu/faculty/snahmod.

Section 1983 Is Born:

The Interlocking Supreme Court Stories of *Tenney* and *Monroe*

BY SHELDON NAHMOD

Section 1983 famously provides a federal damages remedy against state and local government officials and local governments for violations of constitutional rights. Frequently used by litigants to promote constitutional accountability, it generates considerable litigation in the federal courts. It has also been, and remains, a vehicle for the articulation of much constitutional law. Although section 1983 was enacted in 1871, it was largely dormant for many decades because of restrictive interpretations of state action and the Fourteenth Amendment.

It was only in 1951, when the seminal decision in *Tenney v. Brandhove* was handed down, that the Supreme Court for the first time expressly interpreted the language of section 1983.

Tenney arrived at the Court in 1950 when Harry Truman was President and as the Cold War between the United States and the Soviet Union was heating up. Both countries were allies during the Second World War but in the immediate post-war years an “Iron Curtain” (to use the

famous metaphor of Winston Churchill) had descended over Europe. The Soviet Union exacerbated the relationship by using spies against the United States to steal the science of the atomic bomb, leading to the Soviet Union’s testing of an atomic bomb in 1949. As a result of these and other factors, including the Korean War that began in 1950, anti-Communism sentiment began to pervade American politics and society generally. At the national level this was exemplified by the activities of the House Committee on Un-American Activities and the growth of McCarthyism, a particularly strident form of political anti-Communism.

In 1949, William Brandhove, the plaintiff in *Tenney* and an admitted Communist, sued members of the California Senate’s Fact-Finding Committee on Un-American Activities, the so-called “Tenney Committee,” under section 1983 for \$250,000 in connection with his having been summoned as a witness at a hearing on un-American activities. The plaintiff alleged that the hearing was

**Excerpted from Sheldon Nahmod, Section 1983 Is Born: The Interlocking Supreme Court Stories of Tenney and Monroe, forthcoming in volume 17 of the Lewis & Clark Law Review (2013).*

conducted without a legitimate legislative purpose but rather to intimidate and deter him in violation of his First and Fourteenth Amendment rights. The district court dismissed for failure to state a claim but the Ninth Circuit reversed even while expressing doubt that the plaintiff would ultimately prevail on the merits. It held that the plaintiff could inquire into whether the members of the Tenney Committee had an impermissible purpose, and thus abused their powers, in conducting the hearing in violation of plaintiff's First and Fourteenth Amendment rights.

The fact that the case was granted certiorari was not surprising; the Ninth Circuit's decision in *Tenney*, if left standing, had the potential to hamper, if not undermine altogether, state legislative investigations into domestic Communism and Communist subversion. In addition, as the defendants pointed out in their Petition, to the extent that federal courts could inquire into legislative motivation, separation of powers concerns were directly implicated. This would threaten long-standing Congressional investigations into Communist subversion.

Tenney pitted two influential Supreme Court justices, Felix Frankfurter and William Douglas, against one another in majority and dissenting opinions, respectively. Justice Frankfurter, a former Harvard Law School professor and outspoken civil rights and liberties proponent appointed to the Court by President Roosevelt, had become an unrelenting advocate of federalism, deference to politically accountable bodies and judicial restraint, as reflected in his majority opinion in *Tenney*. In contrast, Justice Douglas, a former Columbia Law School and Yale Law School professor, a former chairman of the Securities and Exchange Commission, and similarly an appointee of President Roosevelt, was an ardent proponent of individual rights

who had relatively little concern for federalism and was the sole dissenter in *Tenney*.

“*Tenney* and *Monroe* demonstrate that the early and deep tension between individual rights and federalism was present at the very beginning of section 1983 jurisprudence.”

Ten years later, in 1961, the Court handed down another seminal section 1983 decision in *Monroe v. Pape*, a case brought by an African-American involving alleged police misconduct. *Monroe* arose in the post-*Brown v. Board of Education* period when concern with domestic Communist subversion was still present but diminished, and the nation's attention was increasingly focused on racial discrimination. There had already been highly publicized violence as well as marches on Little Rock, Arkansas and on Montgomery and Selma, Alabama. But in the 1960's the pace and intensity of such demonstrations (led by Martin Luther King, Jr. and others), together with the violent Southern responses to them, were to increase markedly and eventually give rise to the creation of an effective political coalition supporting racial equality.

Monroe dealt with the section 1983 cause of action itself, the Fourteenth Amendment and with local government liability. The plaintiffs, African-American James Monroe and his family (including young children), alleged in their 1959 lawsuit that, in the early morning of October 29, 1958, thirteen Chicago police officers broke into their home, “routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers.” They also alleged that the police

officers had leveled racial insults. James Monroe was then taken to the police station and detained on “open charges” for ten hours, was interrogated in connection with a murder, was not taken before a magistrate, was not permitted to call his family or attorney and was subsequently released with no charges brought against him. He claimed that the police officers, who had no search or arrest warrant, violated his Fourth and Fourteenth Amendment rights. Using section 1983, he sued them for damages and also sued the City of Chicago for damages expressly using a *respondeat superior* theory. The district court dismissed the complaint and the Seventh Circuit, relying on its decision in *Stift v. Lynch*, affirmed on the ground that the alleged misconduct of a city’s police officers did not make a “sufficient showing of a violation” of section 1983.

Justice Douglas’s clerk, Steven B. Duke, recommended granting certiorari not only because there was a circuit split, but also because the Seventh Circuit’s decision (a “bafflement”) had simply ignored section 1983. The local government liability issue, though, was apparently collateral in Duke’s view. Duke further commented that he could find no extended discussion in the legislative history of “color of law.”

In *Monroe*, which was only the second Supreme Court decision interpreting section 1983, Justices Frankfurter and Douglas were again on opposite sides. But this time it was Justice Douglas who wrote the majority opinion. His opinion emphasized individual rights, rejected the defendants’ federalism contentions, expansively interpreted section 1983 and ruled for the plaintiff against police officers. In contrast, Justice Frankfurter wrote an extensive, and aggressive, partial dissent on the color of law issue, emphasizing federalism.

Section 1983 jurisprudence was born in these two interlocking cases. At the

outset, the stories of *Tenney* and *Monroe* must be understood in the political and social settings in which they arose. The Cold War and anti-Communist sentiment situate *Tenney* while the Civil Rights movement and the post-Brown era situate *Monroe*. The stories also emerge from the parties’ petitions for certiorari and briefs in *Tenney* and *Monroe*, and in *Monroe*’s oral argument, as well as the papers of Justices Frankfurter and Douglas and in their majority and dissenting opinions. In particular, Justice Frankfurter, as an advocate of federalism, played an outsized role in both decisions.

Tenney and *Monroe* demonstrate that the early and deep tension between individual rights and federalism—a tension that began with the Fourteenth Amendment and continues to this day—was present at the very beginning of the development of the Supreme Court’s section 1983 jurisprudence. ■

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{Appellate Practice and Procedure}

PRE- AND POST-JUDGMENT
**REVIEW OF SUMMARY
JUDGMENT DENIALS**

AFTER ORTIZ V. JORDAN:
A WIDER AND DEEPER LOOK

forthcoming

Joan Steinman

Distinguished Professor of Law

BA, University of Rochester

JD, Harvard Law School



Joan Steinman's scholarly work always has focused on the operation of the federal courts, sometimes on aspects of complex litigation such as class actions and multi-district litigation, but often on matters of subject-matter jurisdiction. She created a body of scholarship focused on jurisdictional issues that were complicated by their situation/embedding in cases that were removed from state court and therefore were governed by the interplay between the core jurisdictional statutes and the removal and remand statutes. In recent years, Professor Steinman has expanded her work to address important issues of appellate jurisdiction, practice and procedure. Thus, she has written about the constitutionality and propriety of appellate courts' resolving issues in the first instance, standing to appeal and the right to defend a judgment in the federal courts, the appellate rights of persons who are not full-fledged parties, "hypothetical jurisdiction" in the federal appellate courts, and pendent appellate jurisdiction. She also co-authored a casebook, *Appellate Courts: Structures, Functions, Processes and Personnel* (LexisNexis 2d ed., 2006 and 2009 Supplement) (with Daniel J. Meador and Thomas E. Baker).

In her most recent article, which—at this writing—is under submission to law reviews, Professor Steinman brings her careful and thorough analysis to the question: under what circumstances, if any, should federal courts of appeals review a denial of summary judgment, after a case has gone to trial and judgment? This is an issue on which the federal intermediate courts of appeals are split; an issue that the Supreme Court viewed as important enough to grant certiorari on; and an issue that the Court ended up addressing poorly and only in dicta, leading to a further circuit split on the effect of its decision.

For more, visit her faculty webpage at www.kentlaw.iit.edu/faculty/jsteinman.

Pre- and Post-Judgment Review

of Summary Judgment Denials after *Ortiz v. Jordan*: A Wider and Deeper Look

BY JOAN STEINMAN

I AM NOT A FAN of motions for summary judgment. Nonetheless, I write here in support of the post-trial, post-judgment appealability of denials of summary judgment, in limited circumstances. We sometimes should allow appeals of denials, as well as grants, of such judgments, just as we allow appeals of all other orders that may constitute harmful error.

Ordinarily, when a court denies a motion for summary judgment, the denial is not immediately appealable. It merely results in the case proceeding. The denial is immediately appealable only if it satisfies a common law or statutory exception to the final judgment rule, such as 28 U.S.C. § 1292(a) or § 1292(b) or mandamus. In most cases, the first opportunity to appeal a denial of summary judgment will arise after final judgment.

However, when a motion for summary judgment was based on a defendant's absolute or qualified immunity from suit, denial of the motion may be appealable under the collateral order doctrine. Then, an immediate appeal from the denial

is available when the appeal presents a "purely legal issue" such as what clearly established law was at the time of defendant's challenged actions, but an immediate interlocutory appeal is not available when the denial of summary judgment rested on the district judge's conclusion that factual issues, genuinely in dispute, precluded summary judgment. If the defendant fails to take the immediate appeal, or if that appeal is rejected on non-merits grounds such as untimeliness, the defendant will want to appeal the denial of summary judgment after final judgment against him.

This Article addresses whether defendants who fail to take an available pre-judgment appeal of a summary judgment denial waive the right to appeal the denial after trial and final judgment. It also addresses whether defendants who did not waive the right to appeal the denial, including those who had no opportunity to take a pre-judgment appeal, may do so after trial and final judgment. Prior to *Ortiz v. Jordan*, 131 S. Ct. 884 (2011),

**Excerpted from Joan Steinman, Pre- and Post-Judgment Review of Summary Judgment Denials after Ortiz v. Jordan: A Wider and Deeper Look, currently pending publication.*

all federal appeals courts held that, as a general rule, they would not entertain post-trial, post-judgment appeals of summary judgment denials. But some made a “legal question exception.” The Supreme Court perceived the circuits to have divided, and granted certiorari in *Ortiz v. Jordan* to resolve the question whether a party may appeal an order denying summary judgment after a district court has conducted a full trial on the merits.

The Court immediately answered with an unqualified “no.” But that was dicta; the Court actually declined to address the question that it perceived had split the circuits, because in this case, the Court concluded, the denial of summary judgment rested on genuine issues of material fact.

So, what should the law be?

First, when interlocutory appeals of denials of summary judgment are permitted, those appeals should be permissive, rather than mandatory, as the federal intermediate appellate courts nearly unanimously hold.

When interlocutory appeals of summary judgment denials are not available, or when they are available but are permissive and not taken, such appeals should be permitted when summary judgment was denied based on the court’s decision of a question of law, but not when it was denied based on a finding that there were genuine issues of material fact. Reviewing a denial of summary judgment after trial is inappropriate in the latter instance because it is appropriate to view the factual base on which the motion was decided as superseded by the evidence adduced at trial, and “a judgment after a full trial is superior to a pretrial decision because the factfinder’s verdict depends on credibility assessments that a pretrial paper record simply cannot allow.” *Chesapeake Paper Prods. Co. v. Stone & Webster Eng’g Corp.*,

51 F.3d 1229, 1236 (4th Cir. 1995). But if a court denies summary judgment *based on its view of the law*, the above reasoning does not apply. Moreover, the district court settles something about the merits of the claim; the denial decides more than that the case should go to trial. Indeed, it is making law of the case, which the parties may be permitted to challenge in the district court only on limited grounds.

There are good reasons to permit post-trial, post-judgment review of a denial of summary judgment when the question to be posed is a question of law and the issue presented on appeal has not been mooted. First, the task of determining the bases on which summary judgment was denied and whether those bases are “legal” or “factual” is no longer “dubious,” if it ever was. Since at least the Supreme Court’s decision in *Johnson v. Jones*, 515 U.S. 304, 313 (1995), courts of appeals have had to decide whether a summary judgment denial was based on the court’s conclusion that genuine issues of material fact precluded summary judgment or on the court’s legal conclusions concerning whether the undisputed facts gave defendant an immunity from suit. *Johnson* required this determination because the Supreme Court there held that only in the latter circumstance is an interlocutory appeal of the denial available under the collateral order doctrine. *Johnson v. Jones* explicitly rejected the argument that the line that the Court was requiring courts of appeals to draw would be “unworkable” and overly difficult. In addition, courts of appeals routinely categorize issues as questions of fact, questions of law, or mixed questions of fact and law, for purposes of determining the appropriate standard of review. Federal courts of appeals thus have had plenty of practice in making these “law” vs. “fact” distinctions.

Moreover, appellate courts’ greater

expertise (than trial courts) in deciding questions of law joins with the policies that support the final judgment rule (postponing appeal until district court processing of a case has been completed) to argue for post-judgment review of law-based summary judgment denials.

A number of circuits rationalized their refusal to entertain post-trial, post-judgment appeals from denials of motions for summary judgment by asserting that the proper remedy for an erroneous denial of summary judgment was either interlocutory appeal or a Rule 50 motion for judgment as a matter of law. But interlocutory appeals often are not available and, in our federal system, are disfavored when an adequate remedy for an error can be provided after final judgment. Once a final judgment has been entered, the aggrieved party may draw into question on appeal all prior orders that led to the final judgment.

As for Rule 50 motions, if the question that would be posed after trial is no different from the question that was posed by the motion for summary judgment, it is not self-evident why a redundant motion should be necessary. What good reason is there to impose the procedural burden of requiring a party to raise again the same legal points that it made in its summary judgment motion? The better rule is that a litigant should not need to preserve legal arguments that it made in its motion for summary judgment by filing Rule 50 motions reiterating the point. And it would seem to be inconsistent with law-of-the-case doctrine to demand that litigants who lost on a legal point made in support of their motion for summary judgment raise that legal argument again in a Rule 50 motion for judgment as a matter of law. While we may *permit* parties to seek reconsideration of prior interlocutory orders including denials of summary judgment, that is not to say that we do or should re-

quire parties to do so.

Even more importantly perhaps, it turns out that Rule 50 motions are not an appropriate vehicle to raise the legal issues on which summary judgment motions may have foundered. A Rule 50(a) motion is made, in a jury trial, when the party

“When interlocutory appeals of denials of summary judgment are permitted, those appeals should be permissive, rather than mandatory, as the federal intermediate appellate courts nearly unanimously hold.”

against whom judgment is sought has rested its case; the motion is based on the trial record to that point. The movant argues that “a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-moving] party on [a particular] issue,” and that the court should resolve that issue against the non-moving party and grant judgment as a matter of law against the non-moving party because an identified claim or defense cannot be maintained without a finding on that issue favorable to the non-moving party. Rule 50 thus focuses exclusively on the circumstances in which a reasonable jury would not have a legally sufficient evidentiary basis to find for the non-moving party on one or more issues, and explicitly ties the conclusion that one party is entitled to judgment to the absence of sufficient evidence to allow victory for the other side. (It corresponds to that portion of Rule 56 that focuses on whether genuine issues of material fact are posed.)

Rule 50(b) provides that when the judgment motion is not granted, the court submits the action to the jury “subject to a

later determination of the legal questions raised by the motion.” But if the legal questions raised by the motion go only to whether the evidence was sufficient to go to the jury, then nothing in Rule 50(b) supports the proposition that a Rule 50 motion properly may be the vehicle to seek and receive judgment as a matter of law based on purely legal issues.

Is there merit to insistence upon the aggrieved party doing something more than failing with its summary judgment motion, to preserve the issue for appeal? It is said that reviving the issue in some manner would help to avoid surprise to the appellee, and could give the trial court an opportunity to revisit its earlier ruling. However, I don’t know why raising on appeal the legal rulings made in support of the denial of a motion for summary judgment should come as a surprise to the prevailing party. The making of summary judgment motions and the writing of memoranda in support of and in opposition to such motions is a lengthy, onerous and expensive process. Given this reality, it is not as though the legal points made in connection with a summary judgment motion “fly under the radar,” and might bite an unsuspecting adversary after final judgment. Nor will the motion for summary judgment likely have been made and briefed so long before a case went to trial and judgment that opposing counsel will have forgotten about it.

Nor do I see any unfairness to the prevailing party in having to defend its judgment against contentions that a ruling on the law, on which the denial of summary judgment was predicated, was erroneous and harmed the losing party. Any prejudicial error in the proceedings below can nullify the judgment, whether that error was made in rulings on pleadings, rulings on discovery, or rulings at trial. To grant

review to the summary judgment denial and to reverse the judgment would not be unjust to the party that was victorious after all the evidence was in, for the appellate court would be deciding that, under the law, the prevailing party below was not entitled to win; indeed, if the court were to reverse, it would be deciding that his adversary had been entitled to win, as a matter of law, on his motion for summary judgment.

In some circumstances, a consistent failure to object to the admission of evidence that would be irrelevant on the appellant’s theory of the case, as marshaled in its summary judgment motion and memoranda in support, might support a holding that the appellant had waived or not “preserved” the error. A failure to offer evidence in support of the summary judgment movant’s theory of the case also could be damaging. Similarly, a failure to object to jury instructions that were inconsistent with the theory of the summary judgment motion or a failure to propose jury instructions that would apply the theory of the summary judgment motion might warrant support for a holding that the appellant had waived or not “preserved” the error. Perhaps other acts or omissions might support the same result. But appellate courts should *not* bar appeals from law-based summary judgment denials on these grounds until the appeals courts have given litigants advance warning of the acts and omissions that might constitute waiver or failure to preserve—so that such appellants do not become the ones with just complaints of “unfair surprise.” As of now, there is little law that indicates what, if anything (other than making a Rule 50 motion), a litigant must do to preserve for appeal the allegedly erroneous denial of a law-based summary judgment denial.

Also favoring review is the fact that

denial of post-judgment review to denials of summary judgment would inhibit effective appellate court scrutiny of trial court compliance with Rule 56. Moreover, appeal from the denial of summary judgment will be timely so long as the appeal from the final judgment was timely, so there will be no need for any tolling of the time to appeal, notwithstanding the Supreme Court's indication in *Ortiz* that the time to appeal the summary judgment denial in that case had long since run. ■

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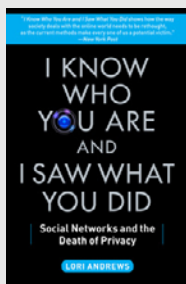
BOOKSHELF *New books by faculty*

Lori Andrews

Distinguished Professor of Law

I Know Who You Are and I Saw What You Did: Social Networks and the Death of Privacy

(Free Press 2012, paperback 2013)



How many things did you reveal about yourself online today? As many individuals have already learned the hard way, the same power of information sharing that can topple governments can also topple a person's career, marriage, finances, or even his or her future. Prof. Andrews explores how our digital identities on the Web—email, personal websites, and social

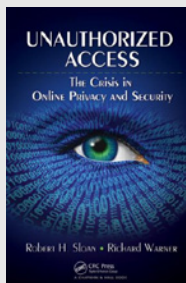
media pages—are starting to overshadow our physical identities. How can you protect the privacy of your digital self? This book shows how people can fight back when what they post on social networks is used against them. Andrews also ignites a battle for further protections, from a right to connect to a right to privacy, and proposes a Social Network Constitution to protect us all.

Richard Warner

Professor of Law

Unauthorized Access: The Crisis in Online Privacy and Security (with Robert H. Sloan)

(CRC Press, summer 2013)



Profs. Warner and Sloan—two renowned experts on computer security and law—explore the well-established connection between social norms, privacy, security, and technological structure. This approach is the key to understanding information security and informational privacy, providing a practical framework to address ethical and legal issues. Bridging

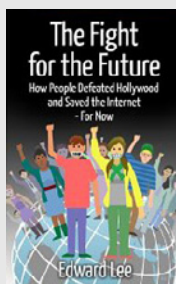
the gap among computer scientists, economists, lawyers, and public policy makers, this book provides technically and legally sound public policy guidance about online privacy and security. It emphasizes the need to make trade-offs among the complex concerns that arise in the context of online privacy and security.

Edward Lee

Professor of Law

The Fight for the Future: How People Defeated Hollywood and Saved the Internet—For Now

(Self-published, print and ebook, fall 2013)



Wikipedia went dark on January 18, 2012. So did thousands of other websites, including search giant Google, all to protest a controversial copyright bill called the Stop Online Piracy Act (SOPA). The protest even helped to ignite mass demonstrations on the streets of over 250 cities in all 27 countries of the European Union to stop a similar attempt to regulate the Internet under the

Anti-Counterfeiting Trade Agreement (ACTA). Prof. Lee's new book provides a gripping look at how people organized the largest Internet protest in history, plus the largest single-day demonstration on the streets of 27 countries of the European Union. In the end, this grassroots movement won an unexpected, but historic first victory in the fight for a "free and open Internet."

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